Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**THOMAS E. HAUERT,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether this court should grant *certiorari* to resolve a conflict between the Courts of Appeals for the Second and the Seventh Circuits as to whether a jury instruction defining good faith as a defense to the element of willfulness in a criminal tax prosecution must, in order to comply with this court's decision in *Cheek v. United States*, inform the jury that good faith is to be determined according to the subjective belief of the defendant and need not be objectively reasonable.

2. Whether, pursuant to Rule 701 of the Federal Rules of Evidence and in light of this court's decision in *Cheek v. United States*, a defendant who asserts good faith belief as a defense to the element of willfulness in a federal tax prosecution is entitled to present lay testimony corroborating the development and sincerity of his beliefs regarding his tax liability, including opinion testimony as to his sincerity.

3. Whether jury argument in a federal tax prosecution was so misleading as to require reversal despite the sustaining of a prompt objection where the United States Attorney argued to the jury that defendant's acquittal on criminal charges for willful failure to file returns and pay taxes would negate his civil liability for unpaid federal income tax.

## PARTIES

There are no parties to this action other than those named in the caption.

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**THOMAS E. HAUERT,**

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas E. Hauert, by his attorney Raymond D. Pijon, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

## OPINION BELOW

The opinion of the Court of Appeals (Seventh Circuit Docket No. 93-3171) is published as *United States v. Hauert*, 40 F.3d 197 (7th Cir. 1994). A copy of the opinion included in the appendix to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1994. No petition for rehearing has been filed in the Court of Appeals. This petition for writ of *certiorari* is being filed within ninety days of the entry of judgment in the Court of Appeals.

The jurisdiction of the United States Supreme Court arises under 28 USC § 1254(1). The Court of Appeals had jurisdiction under 28 USC § 1291. Jurisdiction of the District Court arose under 18 USC § 3231.

## STATUTES AND RULES INVOLVED

### 26 USC § 7201

**Attempt to evade or defeat tax**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to any other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

## 26 USC § 7203

**Willful failure to file return, supply information, or pay tax**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more 1 years, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

## Federal Rules of Evidence, Rule 701

**Opinion by Lay Witnesses**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

## Federal Rules of Evidence, Rule 704

**Opinion on ultimate issue**

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible

is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

## STATEMENT OF THE CASE

### A. Procedural History

The Grand Jury returned an indictment against Thomas E. Hauert in the District Court for the Northern District of Illinois on April 13, 1993. Counts I, III, V, and VII charged Hauert with evasion of income tax for the years 1988, 1989, 1990 and 1991, felonies under 26 U.S.C. §7201. Counts II, IV, VI and VIII charged Hauert with failure to file income tax returns for the same years, misdemeanors under 26 U.S.C. §7203.

The case was tried to a jury before District Judge William T. Hart. The jury returned a verdict of guilty on all counts. Hauert was sentenced under the sentencing guidelines to twelve months in the custody of the United States Bureau of Prisons. Eight days after sentencing, Hauert filed his Notice of Appeal.

### B. The Case at Trial—Government's Case-in-Chief

Internal revenue agent Katherine Batory testified that Hauert had income exceeding the minimum filing requirements for the years at issue. (R. 53) She also explained that employees are required to complete a W-4 form to determine how much money the employer withholds for income taxes. (R. 69, 70) When completing this form the employee is permitted certain allowances based upon the

number of exemptions to which he is entitled. (R. 70) If an employee claims exempt status, no money is withheld by the employer. (R. 74)

In March of 1981, Hauert claimed exempt status and signed the W-4 form with the legend "Only under external pressure from IRS" (R. 76) In 1982, he claimed forty-two allowances (R. 78) and wrote on the form "U/duress." (R. 79) For the years 1988 through 1991, the years charged in the indictment, Hauert claimed exempt status. (R. 79-81)

Batory concluded that Hauert owed $3,769 in taxes for 1988, $3,859 for 1989, $1,804 for 1990, and $3,416 for 1991. (R. 84)

Revenue agent Scott L. Means, while working in 1984 or 1985 on a project involving a mining venture, contacted Hauert, one of its partners. (R. 102-104) Means discovered that Hauert was under audit for the tax years 1980 and 1981 and identified a letter received from him which stated, "I have abandoned my constitutional challenge for those years." (R. 107-108) Means sent a memorandum to the Chicago District counsel including a copy of this letter. (R. 110)

Means ultimately determined that the partnership was legitimate and that Hauert's role in the partnership was merely that of an investor and not a principal. (R. 112)

The third and last witness called by the government was Julia May Dewey, an attorney for the Regional Counsel for the IRS. She became acquainted with Hauert in 1984 when she received a Tax Court petition filed by him. (R. 145) In that petition Hauert contended that withholdings made from his wages were sufficient to pay a large portion of the tax owed, but did not claim wages were not taxable. (R. 149)

The tax court rules encourage informal exchanges and settlement between the parties. (R. 151) Hauert raised only the issue of whether the money withheld from his wages should be applied to his tax liability. (R. 153) When asked specifically whether Hauert ever advised her that he wanted to argue that wages weren't taxable, she answered ". . . No, I don't recall anything." (R. 153)

After a meeting with Hauert, Dewey sent a settlement letter. Hauert, acting pro se (R. 162), accepted the settlement terms and signed the decision documents that were enclosed with the letter. These documents were subsequently filed with the Tax Court settling his case. (R. 155)

Dewey conceded that litigants often concede issues in Tax Court matters in order to reach a settlement. (R. 172, 173)

This concluded the government's case.

### C. The Case at Trial—The Case for the Defendant

Hauert called five witnesses to testify about their knowledge of his tax beliefs and the opinions they had formed about his state of mind on the subject, based on conversations and personal experiences with him. The government sought to limit the scope of examination permitted of these witnesses by motion in limine to preclude Hauert from eliciting any opinions or conversations concerning his beliefs or sincerity on the subject of taxation. (R. 122) In response, Hauert argued that these witnesses had many conversations with him on the subject of taxation; that for him to convince the jury of his good faith belief the jury had to know this and also hear witness opinion of his sincerity on that issue. The district court, relying on Rule 704(b), which prohibits an expert witness from stating an opinion or making an inference about the defendant's mental state, ruled that a lay witness likewise is precluded from rendering such conclusions. (R. 124, 125)

The court limited the testimony of Hauert's witnesses to their opinion of his truthfulness and their knowledge of his reputation for truthfulness.

Hauert' first witness was Ralph Bias. Bias had lived in Joliet for twenty-four years and during that time had worked for Caterpillar. For three of those years he worked side by side with Hauert (R. 191), and they talked about everything. (R. 192) When Bias stated that Hauert is "somewhat of a standout because of some of the things he believes in," the judge sustained a government objection and admonished the witness that "the only admissible evidence here relates to your opinion of his truthfulness or his reputation for truthfulness, that is all." (R. 193) Bias stated that Hauert has a reputation as a truthful person.

Jim Holman was a supervisor in a metallurgy lab. He lived in the Joliet area for sixteen years and during that time met Hauert at the Faith Bible Church. Over the course of those years, he had many conversations with Hauert and with people who knew him. He personally believed that Hauert was honest and sincere and that he possessed a reputation for honesty in the community.

Richard Dobczyk lived in Joliet all his life. He served on the Faith Bible Church Board of Trustees for twelve years and during that time became acquainted with Hauert, who served as the church treasurer. (R. 199, 200) He conversed with Hauert on board matters and on other subjects during social visits and during their work for the Awana Club. He described Hauert as one of the most truthful and honest people he had ever met. (R. 201, 202)

George Shride lived in Channahon, Illinois, just outside of Joliet, for seventeen years. He had worked for Caterpillar for thirty-eight years. At one time he was Hauert's

supervisor. (R. 203) As a result of his experience he had the opinion that Hauert was a truthful person. (R. 204)

Mario Acosta has lived in Joliet since 1980 and worked as a tool designer at Caterpillar. He came to know Hauert at work, at church, and at social events. (R. 205-207) Acosta testified that Hauert was an honest person. (R. 208)

Hauert testified in his own defense. During his forty-six years he had obtained an associate degree in liberal arts and accumulated thirty-five hours of miscellaneous industrial education classes. He had no formal training in taxation or law. (R. 237) He had worked for Caterpillar for twenty-seven years. His duties had ranged from cleaning weld berries to positions as assembly supervisor, welding supervisor, and machine supervisor. (R. 240) Most of his spare time is spent at the Faith Bible Church or with his family. (R. 241)

Hauert had filed income taxes until 1983. Two and a half years earlier, he was swayed by a conversation with a co-employee who believed that the payment of income taxes was voluntary and not mandatory. (R. 243, 244) Hauert read books, booklets, papers and documents and attended meetings of "The Citizens for Just Taxation". (R. 244, 245, 247)

Meetings were held three to four times a year. Speakers included lay researchers and attorneys addressing specific subjects of tax law. (R. 250) Hauert also read Supreme Court cases. (R. 252) In total, he had devoted 8,000 to 10,000 hours to the subject of taxation. (R. 253)

In 1981, Hauert attached a thirteen-page letter to his 1980 1040 Tax Return. (R. 253) The letter proclaimed that wages were not income under the definition of the Code (R. 256), an opinion that Hauert reached after determining that an income tax is an indirect tax which according to the House Congressional Record of 1943 is a tax on

a privilege. (R. 258, 259) He wrote more than twenty letters restating his position and asking the IRS to respond. (R. 254, 255)

Hauert realized that his position on income taxation was contrary to that of most people. He admitted it was contrary to what he had believed for his first fifteen years as a wage earner. He also admitted that holding such an unpopular position bothered him. (R. 265) On the other hand, he was also bothered by the government's failure to answer his letters posing legitimate questions. (R. 266)

Hauert showed the jury a number of letters that he had written over several years to which he never received a satisfactory response. (R. 268) He persisted in trying to get the government to respond, acting without the intention of violating the law. (R. 269) On December 31, 1983, Hauert went to an IRS office to speak to McKinley Bell, an IRS auditor, about an audit of his taxes for the years 1980 and 1981. (R. 285, 286) At this meeting, Hauert questioned Bell on what law makes him liable to file income tax returns. Bell responded that as an auditor he was unfamiliar with the law. (R. 287)

In summary Hauert testified that, based upon his readings, contacts with the IRS, attendance at meetings and research, he had developed a firm belief that he was not liable for income taxes. (R. 292)

The government's cross-examination established that Hauert made a decision to stop paying income taxes in 1983. The decision was due not to any change in the law, but rather to a change in his understanding of the law. (R. 293-306) The government questioned Hauert about negotiations with Julia Dewey leading to his settlement of a civil tax matter for the years 1980 and 1981. Hauert admitted that he did not raise the issue of wages, or any constitutional issues, with her. (R. 345, 346)

In 1982, Hauert claimed forty-two withholding allowances, which the IRS challenged. After investigation, however, the withholding exemptions were found proper. (R. 349-357) In subsequent years, Hauert filed exempt status on his W-4 form, which precluded his employer from withholding any money from his paycheck.

**D. The Case at Trial—Argument**

In closing argument, the government told the jury:

> When you consider the testimony of Mr. Hauert, consider that he is an individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated.

Objection to this argument was sustained. (R. 552)

**E. The Case at Trial—Jury Instructions**

Hauert tendered a "good faith belief" instruction derived from *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991). His proposed instruction read:

> A good faith, honest misunderstanding of the requirements of the law is a defense to the element of willfulness. If you find that the defendant's conduct or beliefs were the result of a good faith, honest misunderstanding of the requirements of the law, you must find the defendant not guilty.
>
> In determining defendant's good faith, you must apply a subjective standard of good faith. That is, you must determine whether the defendant actually believed what he says he believed.
>
> It does not matter whether you consider defendant's belief to be reasonable. The only question for you to decide is whether the defendant's beliefs were honest and in good faith, even if such beliefs are unreasonable.

> If you find that the defendant held his beliefs in good faith, you must find the defendant not guilty.

The District Court rejected petitioner's tendered instruction and instead instructed the jury that:

> If the defendant, in good faith, believed the tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not. (R. 468-472)

## REASONS FOR GRANTING THE WRIT

### I.

**CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS FOR THE SEVENTH AND THE SECOND CIRCUITS AS TO WHETHER THE "GOOD FAITH DEFENSE" INSTRUCTIONS IN A TAX EVASION CASE MUST, IN LIGHT OF THIS COURT'S DECISION IN *CHEEK v. UNITED STATES*, SPECIFICALLY AND UNAMBIGUOUSLY INFORM THE JURY THAT GOOD FAITH SUFFICIENT TO DEFEAT THE ELEMENT OF WILLFULNESS MUST BE DETERMINED ACCORDING TO THE DEFENDANT'S SUBJECTIVE BELIEFS AND NOT ACCORDING TO THE OBJECTIVE REASONABLENESS OF THOSE BELIEFS.**

A grant of certiorari jurisdiction is necessary to resolve a conflict between the Seventh and the Second Circuits regarding the language which must be included in jury

instructions in order to comply with this court's decision in *Cheek v. United States*, 498 U.S. 192 (1991). In affirming petitioner's convictions for willful failure to file federal income tax returns and to pay income taxes, the Seventh Circuit stated:

> We are not prepared to adopt the reasoning of *United States v. Pabisz*, 936 F.2d 80, 83 (2nd Dist., 1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Slip opinion at pp. 10-11

Because the Court of Appeals has made an explicit determination to reject as unnecessary the very language regarded by the Second Circuit as essential for compliance with *Cheek*, and because the form of instruction approved in this case is neither sufficiently specific nor sufficiently free from ambiguity to satisfy the requirements of that decision, this court should allow a writ of *certiorari* and reverse the judgment of the Court of Appeals for the Seventh Circuit.

This case, like *Cheek*, was a prosecution for "willfully" failing to file federal income tax returns and "willfully" failing to pay federal income taxes. The defense was that Hauert firmly, sincerely and in good faith believed that he was not liable to file the returns or to pay the taxes in question.[1]

Although the common-law rule that "ignorance of the law is no excuse" applies to the majority of criminal violations, *Ratzlaf v. United States*, ____ U.S. ____, 114 S.Ct.

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[1] Unlike the defendant in *Cheek*, however, Hauert did not claim that the income tax laws were in any way unconstitutional.

665 (1994), an exception has long been recognized for criminal violations of the federal tax code. As long ago as *Murdock v. United States*, 290 U.S. 389 (1933), this court construed the word "willfully," when employed to define the predicate mental state for criminal tax violations, as an indication that:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. 290 U.S. at 396

Subsequent decisions equated "willfulness" with "a voluntary, intentional violation of a known legal duty," *United States v. Bishop*, 412 U.S. 346 (1971), *United States v. Pomponio*, 429 U.S. 10 (1976).

Under these decisions a good faith, if mistaken, belief in the legality of one's conduct was a defense negating the mental state of "willfulness" required for conviction of certain criminal tax offenses. A conflict among the circuits developed, however, between those which judged good faith solely according to the subjective belief of the defendant, *e.g.*, *United States v. Schiff*, 801 F.2d 108 (2nd Cir. 1986), *United States v. Jerde*, 841 F.2d 818 (8th Cir. 1988), *United States v. Harting*, 879 F.2d 765 (10th Cir. 1989), and those which required that such a belief be not only sincerely held but also objectively reasonable, *e.g.*, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989), *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987).

This is the conflict that was resolved in *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604 (1991), where this court held that a defendant could not be convicted of willfully failing to file returns if he held a subjective belief that the law did not impose such a duty upon him. This court observed:

> It is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he had no duty. 111 S.Ct. at 611.

It was the government's burden in this case to establish that petitioner acted "willfully," meaning that he intentionally violated a known legal duty. *United States v. Birkenstock*, 823 F.2d 1026 (7th Cir. 1987); *United States v. Ferguson*, 793 F.2d 828 (7th Cir. 1986). A "good faith" belief is a defense to charges that include willfulness as an element. *United States v. Chen*, 605 F.2d 433 (9th Cir. 1979).

Petitioner Hauert, who had no formal training in taxation or law (R. 237), estimated that he had spent between 8,000 and 10,000 hours in conversing, reading and attending lectures on the subject of income taxation. (R. 253) He wrote more than twenty letters to the IRS setting forth his understanding of the law, doggedly seeking a response to questions he posed about his liability to pay income tax. (R. 255) The absence of an official response made Hauert suspicious and deepened his conviction that he bore no legal responsibility to pay income taxes.

Hauert, while acknowledging that his opinion was "contrary to that of most people" and to the views he himself had accepted for many years (R. 265), believed that wages were not income within the definition of the Internal Revenue Code.[2] (R. 253-259)

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[2] In its original opinion in *United States v. Cheek*, 882 F.2d 1263, 1268-1269, n.2 (7th Cir. 1989), *rvsd, Cheek v. United States*, 498 U.S. 192 (1991), the Court of Appeals noted that "the belief that wages are not income and therefore are not subject to federal income tax laws" was one of the "stock arguments of the tax protestor movement [which] have not been, nor ever will be, considered 'objectively reasonable' in this circuit". Significantly, in

(Footnote continued on following page)

Hauert tendered a "good faith belief" instruction based upon the decision of the Court of Appeals for the Second Circuit in *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991). His proposed instruction read:

> A good faith, honest misunderstanding of the requirements of the law is a defense to the element of willfulness. If you find that the defendant's conduct or beliefs were the result of a good faith, honest misunderstanding of the requirements of the law, you must find the defendant not guilty.
>
> In determining defendant's good faith, you must apply a subjective standard of good faith. That is, you must determine whether the defendant actually believed what he says he believed.
>
> It does not matter whether you consider defendant's belief to be reasonable. The only question for you to decide is whether the defendant's beliefs were honest and in good faith, even if such beliefs are unreasonable.
>
> If you find that the defendant held his beliefs in good faith, you must find the defendant not guilty.

The District Court rejected petitioner's tendered instruction and instead instructed the jury that:

> If the defendant, in good faith, believed the tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income

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[2] *continued*
the same footnote the Court of Appeals distinguished this contention from those which asserted, on one basis or another, that the income tax laws were unconstitutional.

> taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not. (R. 468-472)

On direct appeal the Court of Appeals affirmed Hauert's conviction, concluding that the instruction given was sufficient to comply with *Cheek* and declining to follow the Second Circuit standard as enunciated in *Pabisz*. Recognizing that *Cheek* equated willfulness with the "voluntary, intentional violation of a known legal duty," (slip opinion at p. 10), the Court of Appeals nevertheless concluded that "*Cheek*, in our opinion does not mandate the use of the word 'subjective' or words 'subjective standard' as argued by defendant. It does require the elimination of the words 'objectively reasonable'. . . as applied to a willful violation of a known legal duty." (slip opinion, p. 10)

The Court of Appeals found the instruction adequate as given, observing:

> The district court did eliminate any reference in its instruction to an objectively reasonable standard or to the measure of the conduct of a reasonable taxpayer. We believe the instructions given, taken as a whole, conform to the Supreme Court's requirements in *Cheek*:
>
> > In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. [citation to *Cheek*]

> The jury was adequately instructed about defendant's good faith belief defense, a belief "that the tax laws did not require that he file individual tax returns for a particular year." The district court also instructed the jury that if the government failed to prove beyond a reasonable doubt that he had no such good faith belief, his failure to file a return or pay income taxes for a particular year was not a "willful" violation of his duty. The district court instructed the jury that the government was required to prove a "willful" violation, one that was "voluntary and intentional." (slip opinion at p. 10)

But the instruction given by the District Court was not adequate to comply with *Cheek* for two reasons: first, because it failed to explain to the jury, clearly and unambiguously, that the test of good-faith belief is a completely subjective test in which objective reasonableness has no place; and secondly because the second paragraph of the instruction, given without any basis in the evidence, confused and diluted the message of the first paragraph.

The Second Circuit has sensibly determined that the jury evaluating the good-faith belief defense in a criminal tax prosecution should not be left to speculate as to the standard but should be unambiguously given a correct statement of the law. In *United States v. Pabisz*, 936 F.2d 80 (2nd Cir. 1991), the court held:

> The basic problem with the instruction given is that, on the issue of good faith, the jury was not instructed that it must consider whether Pabisz subjectively believed that he did not need to file income tax returns or pay taxes. . . . Put another way, the court did not instruct the jury that defendant's beliefs need not be objectively reasonable if they were actually held in good faith. 936 F.2d at 83

This is the standard of specificity that the Seventh Circuit clearly and deliberately decided not to follow when it held,

> We are not prepared to adopt the reasoning of *United States v. Pabisz*, 936 F.2d 80, 83 (2nd Dist., 1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Slip opinion at pp. 10-11

The Court of Appeals apparently was of the opinion that the instruction as given made the same point in different words, and that the degree of clarity required by the Second Circuit was to insist upon a mere surplusage of protection. But the Court of Appeals was mistaken. It is true that the instruction in this case cured the earlier error of affirmatively instructing the jury as to an incorrect standard. It still, however, left the jury to speculate whether a good-faith belief sufficient to negate the element of willfulness was in any way limited by the reasonableness of that belief.

That the jury would engage in such speculation is by no means an idle fear. The identical misconception was long entertained by the Seventh Circuit itself when it read an implied condition of objective reasonableness into the *Murdock/Bishop/Pomponio* cases, *Miller v. United States*, 868 F.2d 236 (7th Cir. 1989), *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987), *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989).

The instruction given in this case was, essentially, a *Murdock/Bishop/Pomponio* instruction which left the subjective/objective question unresolved. *Pabisz* properly concluded that the *Cheek* decision requires a clear, explicit

and unambiguous instruction. This court should grant *certiorari* and hold that *Pabisz* is the proper statement of the law.

The second paragraph of the District Court's instruction presents a related problem. In that paragraph the court warns the jury that willfulness is not negated by a belief that the tax laws are unconstitutional or by a mere disagreement with the tax laws. Had Hauert testified that he believed the tax laws are unconstitutional, this paragraph would have been warranted, as it was in the *Cheek* case. See also, *United States v. Dykstra*, 991 F.2d 450, 452, 453 (8th Cir. 1993). The record is clear, however, that Hauert affirmatively disavowed any belief that the tax laws are unconstitutional. As for the question of disagreement with the tax laws, the court provided no direction on what constitutes a disagreement. It is certainly possible that the jury took Hauert's subjective belief that the tax laws did not create a liability for him as an indication of such disagreement.

An instruction must have an evidentiary basis, *Velasquez v. United States*, 244 F.2d 416, 420 (10th Cir. 1957). Instructions irrelevant to the facts of the case or concepts unclear in meaning can easily mislead jurors into erroneous speculations. The inapplicable second paragraph given here invited the jury to speculate, contrary to the evidence, that Hauert considered the tax code unconstitutional or that he simply disagreed with the concept of income taxation. An instruction which invites conviction on a theory which lacks evidentiary support is improper and prejudicial. This is particularly so in the case of a *Cheek* instruction, for the distinction drawn by the two sections of the *Cheek* decision between misunderstanding of tax obligations on statutory grounds, which is a defense, and rejection of those obligations on sincere but mistaken constitutional grounds, which is not, is subtle and confusing,

*see Cheek*, Scalia, J., concurring. The jury could easily have understood the second paragraph as a dilution, if not a virtual negation, of the first.

The good-faith belief instruction approved by the Seventh Circuit in this case would not have passed muster in the Second Circuit, for it is dangerously ambiguous in defining an essential element of criminal tax offenses. This court should grant *certiorari* to resolve a conflict between these circuits over what is necessary for an adequate *Cheek* instruction.

## II.

**CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS CREATED A RULE OF EVIDENCE APPLICABLE ONLY TO CRIMINAL TAX CASES WHERE WILLFULNESS IS AN ELEMENT OF THE OFFENSE, ENGRAFTING ONTO RULE 701, WHICH GOVERNS THE OPINION TESTIMONY OF LAY WITNESSES, THE RULE 704(b) PROHIBITION AGAINST EXPERT TESTIMONY AS TO A DEFENDANT'S STATE OF MIND.**

Certiorari should be allowed because the Court of Appeals for the Seventh Circuit upheld the improper and prejudicial restrictions which the District Court placed on Hauert's attempt to corroborate his "good-faith belief" testimony.

The sole contested issue at trial was whether or not Hauert's failure to comply with obligations imposed by the internal revenue code was "willful", an essential predicate state of mind for criminal conviction.[3] He testified that in his judgment, developed after extensive study of the revenue code over the course of a decade, he was not liable to pay income taxes or to file income tax returns. The defense at trial contended that Hauert's belief

[3] See Argument I, *supra*.

was held sincerely and in good faith so as to negate the element of willfulness.

The government sought to prove that Hauert was motivated by a grudge against the Internal Revenue Service and ceased to file returns or pay taxes because he was disgruntled by the outcome of a civil tax dispute.

Hauert sought to introduce the testimony of five longtime friends and acquaintances that:

> 1) his interest in the subject of income taxes was of long standing and virtually a preoccupation;
>
> 2) his conviction that he was not liable for taxes was, in the opinion of these witnesses, sincerely maintained;
>
> 3) he enjoyed an excellent reputation for truthfulness and was, in the opinion of the witnesses, a truthful person.

The District Court permitted Hauert's witnesses to testify only as to the third of these propositions, completely forbidding inquiry into the other two. Cf., *Carter v. United States*, 252 F.2d 608, 617, 102 U.S. D.C. 227 (1957). The witnesses, Ralph Bias, Jim Holman, Richard Dobczyk, George Shride and Mario Acosta, were longtime residents of the Joliet area who had known Hauert as an employee for Caterpillar, as a member of the Faith Bible Church and as a member of the community. Some had worked with him for years, some served with him on the church board and some socialized with him and his family. Each held the opinion that Hauert was a truthful and honest person and that he was so regarded by his peers. (R.189-208)[4]

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[4] Prior to trial, Defendant Hauert was examined by Dr. Lyle Rossiter, a psychiatrist. The government was given notice of the

(Footnote continued on following page)

Hauert proposed to question these witnesses beyond the limited scope permitted in testimony to establish character and reputation.[5] He sought their observations and opinions of his sincerity in the beliefs he espoused on taxation, based on face-to-face discussions on the subject combined with their judgment on his character. (R 122,123) Such opinions and judgments are the kind lay people are capable of forming and that they do in fact form every day. They would have aided the jury in making its decision, not usurped its decision-making function as might the opinion of an expert. See, *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986).

Under Rule 701, a witness, not testifying as an expert, may render opinions or draw inferences which are: "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Rule 704(a) permits opinion or inference that embraces an ultimate issue, provided it is not the opinion of an expert testifying about

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[4] *continued*
results of Dr. Rossiter's examination and the defendant's intent to call him as an expert witness. The substance of Dr. Rossiter's opinion was that Hauert was "credible, sincere and manifests a good faith belief and understanding concerning his perceived obligations under the Internal Revenue Code." (C. 24)

The government moved to exclude Dr. Rossiter's testimony on the grounds that Federal Rule of Criminal Procedure 704(b) prohibits an expert witness from testifying with respect to the mental state or condition of a defendant in a criminal case. (C. 24)

Recognizing the special limitations imposed upon opinion evidence by an expert witness under Rule 704(b), Hauert chose to forego Rossiter's testimony and instead sought to present opinions of lay witnesses under Rule 701.

[5] Although the Court of Appeals mentions the absence of a formal offer of proof, the opinion itself makes clear that the anticipated testimony of the defense witnesses was explained to the District Court in colloquy with counsel.

the mental state or condition of the defendant. These rules broadened the law set in earlier cases by permitting the introduction of more evidence than was formerly admissible. Greater reliance is placed on cross-examination to test the validity or weight of the opinion. See, *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981), cert. den. 102 S.Ct. 1017, 454 U.S. 1150, 71 L.Ed.2d 305, FBI agents testified that the defendant was sane at the time of the offense; *United States v. Juvenile Male*, 864 F.2d 641 (9th Cir. 1988), lay testimony on intent based on observations of the defendant wielding a knife and had exposed genitals; *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), lay testimony of ownership, a key issue in the case, based on personal knowledge as secretaries; *United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972), lay testimony permitted on observations and opinions as to insanity, the defense in the case.

A good faith defense rests upon the jury's understanding of the defendant's subjective state of mind. A defendant needs to develop his character and beliefs through independent evidence by witnesses who have had opportunity to make reliable observations of his conduct. See, *United States v. McClintic*, 570 F.2d 685, 689, 690 (8th Cir. 1978). Such evidence should be liberally admitted. *United States v. Alden*, 476 F.2d 378, 385 (7th Cir. 1973).

Ordinarily, the decision of the trial court to exclude evidence will not be overturned on review unless the error was an abuse of discretion. But the rule is not applicable in this case because the court never exercised any discretion. It believed that the evidence was precluded by Rule 704(b).[6]

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[6] "Now, it is true that 704(b) is cast in term of the opinion of an expert witness, but by extension I think a reasonable exten-

(Footnote continued on following page)

In affirming Hauert's conviction the Court of Appeals did not explicitly adopt the reasoning of the District Court but reached the same result implicitly incorporating Rule 704(b) into Rule 701. The Court of Appeals first held that the disputed opinion testimony was inadmissible if offered "to show Hauert's knowledge, or lack thereof, about filing returns and reporting wages and other receipts as income." (slip opinion, p. 7) It went on to note that to the extent the witnesses were called to express an opinion as to Hauert's honesty and to establish his general reputation for truthfulness, the testimony was allowed. (Slip opinion, p. 7) With these observations petitioner has no quarrel.

The Court of Appeals went on, however, to uphold the preclusion of the very testimony that would have corroborated Hauert in his good faith testimony and in responding to the government's assertion of a "grudge" motive:

> While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. *We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here.* In this case, such testimony was not helpful to the jury. (Slip opinion, p. 8, emphasis supplied)

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[6] *continued*
sion is that nor may any lay person testify to whether or not the defendant did or did not have the mental state or condition constituting an element of the crime charged." (R. 124)

This ruling creates a special exception applicable only to so-called "tax protestor" cases by which the limited restriction of Rule 704(b) is engrafted, without authority or reasonable basis, onto the general standard of Rule 701 which would permit the testimony offered here by Hauert to corroborate his defense. Furthermore, once the government introduced the unnecessary subject of Hauert's motivation it opened the door to a complete response. Due process requires that a defendant have an opportunity to respond to the evidence or argument of the prosecution, *see Skipper v. South Carolina*, 476 U.S. 1 (1976), *Gardner v. Florida*, 430 U.S. 349 (1977), *Simmons v. South Carolina*, ____ U.S. ____ (1994).

## III.

## THE COURT OF APPEALS FOUND NO REVERSIBLE ERROR IN THE PROSECUTOR'S JURY ARGUMENT EVEN THOUGH THE ASSISTANT UNITED STATES ATTORNEY MISINFORMED THE JURY THAT ACQUITTAL ON CRIMINAL TAX CHARGES WOULD ABSOLVE THE DEFENDANT OF LIABILITY FOR HIS UNPAID TAXES.

"Good faith" is an affirmative defense. In order to assert this defense, the defendant must produce sufficient evidence to satisfy the court there is a basis for the defense before a jury instruction is permitted. In this requirement, a good faith defense is no different from any other special, affirmative defense. In such a defense, it is the defendant's burden to produce sufficient evidence to raise the defense; however, once the defendant has satisfied that burden, the burden shifts to the government to disprove the defense beyond a reasonable doubt. *United States v. Bailey*, 444 U.S. 394, 415 (1980); *United States v. Falcon*, 766 F.2d 1469, 477 (10th Cir.1985) (defense of duress); *United States v. Richardson*, 588 F.2d 1235, 1239

(9th Cir. 1979) (defense of necessity); *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir.) cert. denied 474 U.S. 831 (1985); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) cert. denied 474 U.S. 1064 (1986) (defense of entrapment).

In *Walker v. Endell*, 828 F.2d 1378 (9th Cir. 1987), amended, 850 F.2d 470 (9th Cir. 1987), cert. denied, 109 S.Ct. 309 (1988), the Court noted that if a defense negates an element of the crime, rather than mitigating culpability once the crime is proven, it would be unconstitutional to put the burden for proof on that defense on the defendant. (850 F.2d at 472)

The government shifted the burden to Hauert by the following argument made during its rebuttal summation:

> When you consider the testimony of Mr. Hauert, consider that he is an individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated. (R. 552)

Hauert's objection to this argument was sustained.

The government's argument was susceptible of only one, doubly inaccurate, meaning: that Hauert bore the burden of proof on the issue of good faith belief and that if the jury were to acquit Hauert on the criminal charge of willful failure to file returns or pay taxes, Hauert would be free of the civil liability to pay those taxes. He would, in the prosecutor's words, be "home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated." (R. 552) A more flagrant and prejudicial misstatement of the law is difficult to imagine. These words convey only one rational meaning: that if Hauert were found not guilty on the criminal charges he would be exempt from paying his back taxes.

The Court of Appeals was satisfied that an objection to this argument was sustained. The cure was inadequate. *Certiorari* should be allowed and the judgment of the Court of Appeals reversed.

## CONCLUSION

Wherefore, Petitioner Thomas Hauert respectfully asks this court to grant a petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit, and that on review it reverse the judgment of the Court of Appeals and order a new trial in this cause.

Respectfully submitted,

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# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

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No. 93-3171

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

THOMAS E. HAUERT,

*Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 CR 285—**William T. Hart**, *Judge.*

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ARGUED SEPTEMBER 7, 1994—DECIDED NOVEMBER 14, 1994

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Before POSNER, *Chief Judge*, and EASTERBROOK and WELLFORD,* *Circuit Judges.*

WELLFORD, *Circuit Judge.* After conviction by a jury in the district court for tax evasion (violation of 26 U.S.C. § 7201) and for failure to file tax returns for the calendar years 1988 through 1991 (violation of 26 U.S.C. § 7203), defendant, Thomas E. Hauert, has appealed his convictions and sentences to this court. Conceding that he had failed to file federal income tax returns since 1986, Hauert first maintains that the district court erred "in allowing

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* The Honorable Harry W. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

the government to introduce evidence of defendant's compromise and settlement negotiations in a 1984 civil tax case." Next, he asserts error by the trial judge in "denying defendant an opportunity to present lay opinion testimony . . . relevant to the issue of good faith." Hauert also challenges certain jury instructions given by the district court applicable to his claimed "good faith" defense. He avers, moreover, prosecutorial misconduct denying him a fair trial, and, finally, that the government erroneously shifted the burden of proof from the prosecution. We discuss these grounds of Hauert's appeal seriatim.

## I. *BACKGROUND*

Hauert worked regularly for the Caterpillar Company for many years including the years in question, and received payment for his earnings that mandated filing a federal income tax return for each of the years in contention, unless "excused" from criminal liability for his failure to file by reason of his so-called "good faith misunderstanding of the law" defense. This court is aware at the outset that we decided in 1989, after argument in 1988, that an "objectively reasonable standard" was to be applied in this type of criminal tax liability situation involving charges of tax evasion and failure to file federal income tax returns. *United States v. Cheek*, 882 F.2d 1263, 1265 (7th Cir. 1989), *cert. granted*, 493 U.S. 1068 (1990), *vacated*, 498 U.S. 192, 201 (1991) (eliminating "objectively reasonable standard"). The tax years 1980 through 1986 were involved in the *Cheek* case.[1]

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[1] Since the government concedes that *Cheek* principles, as enunciated by the Supreme Court in 1991, do not retroactively apply to all the tax years at issue in this indictment, we are not called upon to decide any possible retroactivity problem. We must apply *Cheek*, then, to all the issues involved in this case by reason of Hauert's "good faith misunderstanding of the law" defense.

## II. *EVIDENCE OF PRIOR TAX SETTLEMENT*

Hauert objected to the testimony and evidence involving his claimed tax exempt status asserted on W-4 withholding tax forms for his salary during 1980, and 1981. (Hauert maintains in his brief that he also claimed exempt status for the years 1988 through 1991.)

Hauert was audited by the Internal Revenue Service ("IRS") because of certain partnership income purportedly attributable to him in 1980 or 1981. During the course of the IRS' audit for those years, Hauert asserted in a letter that "I have abandoned my constitutional challenge for those years." Hauert claims that allowing the government to introduce this and other evidence of his dealings with IRS agents indicating an abandonment of any constitutional challenge to the taxability of his Caterpillar earnings was prejudicial error. There was also evidence admitted at trial, over defendant's objection, of his signing settlement documents in 1984 foregoing a contention that his wages or salary were not taxable.

Hauert does not contest that evidence of his prior compliance with the laws he later claimed to misunderstand in earlier tax years is not admissible. This evidence is relevant to his actual subjective intent and his understanding of his income tax obligations to file and to pay tax on earnings from employment. Defendant argues that the evidence of his conduct during the income tax audit during 1984 is "irrelevant," "cumulative," and "contrary to policy concerning settlement."

Defendant's reliance on *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978), in support of the above contention, is misplaced. *Robertson, not* a tax case, involved a drug charge and admissions made by a defendant to DEA agents in a parking lot. The *Robertson* court discussed FED. R. CRIM. P. 11(e)(6) and FED. R. EVID. 410 with regard to admissibility of statements " 'in connection with, and relevant to' an offer to *plead guilty*." 582 F.2d at 1364 (emphasis added). Among other things, in overruling defendant's contentions in that case, the *en banc* court

observed that "[c]ourts have been very reluctant to allow an accused to withdraw a guilty plea merely on allegations of a misunderstanding resulting from an accused's purely subjective beliefs." *Id.* at 1367.

Nor do we believe that FED. R. EVID. 408 is of assistance to defendant in respect to this assertion of error. Among other things, while generally proscribing admissibility of "conduct or statements made in compromise negotiations," this rule adds that it "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," and also "when the evidence is offered for another purpose." *See* FED. R. EVID. 408. In adopting this language, the Conference Committee Report explained that "evidence of facts disclosed during compromise negotiations is not inadmissible." *See* H. R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099.

The purpose of the evidence in question was to show Hauert's knowledge and intent regarding his obligation to report and pay taxes on his Caterpillar (and other) earnings. As stated in *Cheek*, "in deciding whether to credit [defendant's] good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that [defendant] was aware of his duty to file a return and to treat wages as income." *Cheek*, 498 U.S. at 202. The evidence involving the earlier years may not have been admissible to show Hauert's civil tax liability in those earlier years or to his claims or the government's claims in the context of civil tax liability. This evidence was admissible under Rule 408 for "another purpose" in this case. *See United States v. Birkenstock*, 823 F.2d 1026, 1028 (7th Cir. 1987).

As stated in a case cited by defendant, "Federal Rule of Evidence 408 permits evidence of settlement agreements for purposes other than proving liability." *United*

*States v. Hays*, 872 F.2d 582, 588-89 (5th Cir. 1989).[2] The evidence in question was admitted to show whether Hauert knew "what the law is" and his "legal duty" thereunder. *See Cheek*, 498 U.S. at 202, 203 n.8. We find that the district court was acting within its sound discretion by admitting the evidence at issue. *See also United States v. Farmer*, 924 F.2d 647 (7th Cir. 1991); *Breur Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.*, 687 F.2d 182 (7th Cir. 1982).

We are not persuaded by Hauert's contentions in this regard.

## III. *LAY OPINION TESTIMONY*

Hauert recognizes "the special limitations imposed upon opinion evidence by expert witnesses under Rule [FED. R. EVID.] 704(b)," and thus does not appeal the district court's decision to preclude a proffered psychiatric opinion that he was "credible, sincere and manifests a good faith belief" with respect to IRC obligations. He argues, however, that it was prejudicial error under FED. R. EVID. 701 and 704(a) to prevent such testimony from lay witnesses who were fellow employees and long-time friends. In particular, Hauert sought to present these witnesses to attest to his sincerity about his income tax beliefs. He relies upon the following language of FED. R. EVID. 701:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and

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[2] *Hays*, also not a tax case, held that district courts have wide discretion in determining relevancy under Rule 401. *Hays*, 872 F.2d at 587. *Hays* also indicated that evidence that defendant was engaged in conspiratorial conduct could not be admitted under Rule 408 by introducing evidence of prior settlement agreements between defendant and others alleged to be co-conspirators. *Id.* at 589. *Hays* is otherwise distinguishable from the instant case, in our view.

> (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

*See* FED. R. EVID. 701.

Hauert also relies upon that portion of FED. R. EVID. 704(a), which permits opinion evidence embracing an ultimate issue. The district court ruled that the lay opinion evidence sought to be introduced was substantially the same as the proffered expert evidence, which was barred under FED. R. EVID. 704(b). The district court barred such lay opinion testimony dealing with defendant's subjective sincerity, motivation, knowledge, or state of mind. The district court did not prevent the lay witnesses from testifying about the context of their association and contact with Hauert, but foreclosed their opinions about his sincerity and "good faith" belief. The government maintains that issue should be governed by Rule 701, rather than Rule 704, although it, of course, agrees with the result reached by the district court. Rule 701 deals generally with "opinion testimony by lay witnesses." Although a lay witness may, in appropriate circumstances, give an opinion on an "ultimate issue," we agree that the basic inquiry with respect to the district court's evidentiary rulings on lay witness testimony is governed by FED. R. EVID. 701.

In offering the testimony of these witnesses, defendant's lawyer described them as "credibility witnesses," and then there was discussion about FED. R. EVID. 608, regarding opinion about defendant's reputation, and limiting their testimony to opinion of Hauert's character and reputation as to truthfulness. Defendant's attorney objected to being limited so as not to ask these witnesses about Hauert's "sincerity." Defendant's attorney added that these witnesses had "numerous conversations and interactions" with Hauert "on the issue of taxation, and have formulated opinions as to whether he is sincere and believes his statements." The district court ruled, however, without specific reference to Rule 701, that these witnesses would not, under the circumstances, be permitted to give opinions

about defendant's "mental state or condition constituting any element of the crime charged . . . a totally subjective matter." The district court summarized its ruling by concluding that lay witness opinion testimony on Hauert's "state of mind" or the sincerity of his "good faith" defense "is not appropriate."

Defendant's counsel made no further specific proffer as to the content of the proposed testimony nor did he offer any witness outside the presence of the jury to make a record of it. These five witnesses did testify to Hauert's reputation for truthfulness, his employment, and his active church involvement. Witness Holman testified that Hauert was a "sincere and honest person." Witness Dobsczyle added that Hauert was "one of the most truthful, honest people that I have ever met." Witness Acosta, a close friend, supplemented the opinion of truthfulness to state: "I don't think you could find anybody that would say a bad thing about him."[3]

On the issue of lay opinion testimony concerning Hauert's knowledge of tax law requirements, we agree with the opinion in *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992), that opinion testimony on a party's knowledge of the law "in most instances . . . will not meet the requirements of Rule 701." If offered, then, to show Hauert's knowledge, or lack thereof, about filing returns and reporting wages and other receipts as income, we believe the district court did not abuse its discretion in denying lay testimony to this effect.

The opinion testimony introduced by defendant that Hauert was "honest, sincere," and a good person generally did come into evidence. That evidence bore upon his

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[3] Acosta also was permitted to testify, outside the jury's presence, that he had accompanied Hauert to an IRS office and that Hauert pursued many income tax questions that were not answered, but the district court reserved a ruling on the admissibility of this testimony. Hauert's counsel made no further motion to introduce this testimony before the jury.

"good faith" defense. Whether the evidence would be, as required by Rule 701, "helpful to a clear understanding" of Hauert's testimony and position is essentially a matter of sound judgment and within the discretion of the district court. "[U]ltimately, the question of whether a lay opinion falls into the category of 'meaningless assertion' or whether that opinion actually will help the jury decide an issue in the case is a judgment call for the district court." *United States v. Allen*, 10 F.3d 405, 415 (7th Cir. 1993).

We consider here a ruling on admissibility of lay witness opinion, testimony about a defendant's state of mind, his intent or belief with particular reference to Rule 701(b)—whether the evidence would be "helpful to a clear understanding" of the issues by a jury. *United States v. Guzzino*, 810 F.2d 687, 699 (7th Cir.), *cert. denied*, 481 U.S. 1030 (1987). While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here.[4] In this case, such testimony was not helpful to the jury.

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[4] Even if such lay witness opinion evidence were deemed helpful and relevant by the district judge, he may still consider, under FED. R. EVID. 403, whether such evidence should be excluded as "substantially outweighed by the danger of unfair prejudice . . . or [the] needless presentation of cumulative evidence." *See* FED. R. EVID. 4030.

## IV. *JURY INSTRUCTIONS*

Citing *Cheek v. United States*, 498 U.S. 192 (1991), defendant objects to the district court's instruction on the government's burden to prove that he acted "willfully" with respect to his charged violations of the income tax laws.[5] Hauert argued the *Cheek* case rationale to the jury, maintaining that his knowledge and belief are based upon subjective standards ("this calls for you [the jury] to enter into the mind and mental processes of this man"). The district court's instructions did not use the word, "subjective standard," as to Hauert's claim of good faith belief, but used the following language:

> If the defendant, in good faith, believed that tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the law he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not.

*Cheek* referred to the holding of *United States v. Murdock*, 290 U.S. 389 (1933), that "defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief." *Cheek*, 498 U.S. at 200. *Cheek* also referred to *United States v. Pomponio*, 429

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[5] In his closing argument, Hauert's counsel stated that the government had to prove beyond a reasonable doubt that "Mr. Hauert has willfully and with the intention to disobey the law done certain things."

U.S. 10 (1976) (per curiam), that the statutory language "required a finding of bad purpose or motive." *Cheek*, 498 U.S. at 200, 201. *Cheek* concluded that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' " *Id.* at 201. *Cheek*, in our opinion, does not mandate the use of the word "subjective" or words "subjective standard" as argued by defendant. It does require the elimination of the words, "objectively reasonable," *id.*, as applied to a willful violation of a known legal duty.

The district court did eliminate any reference in its instructions to an objectively reasonable standard or to the measure of the conduct of a reasonable taxpayer. We believe the instructions given, taken as a whole, conform to the Supreme Court's requirements in *Cheek*:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

*Id.* at 202.

The jury was adequately instructed about defendant's good faith belief defense, a belief "that tax laws did not require that he file individual tax returns for a particular year." The district court also instructed the jury that if the government failed to prove beyond a reasonable doubt that he had no such good faith belief, his failure to file a return or pay income taxes for a particular year was not a "willful" violation of his duty. The district court instructed the jury that the government was required to prove a "willful" violation, one that was "voluntary and intentional."

We are not prepared to adopt the reasoning of *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income

tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." *Pabisz* may be distinguishable, however, because the prosecutor urged the jury to consider whether defendant "had to know *objectively* if whether [sic] he had to file,"[6] and that was not done in this case. *Id.* (emphasis added).

Nor do we find the district court's instructions on the definition of a *known* duty to be in error as contended by defendant. Finally, we find no error in the court's instruction that "[n]o person can intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious." *See, e.g., United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986).[7] We do not agree with defendant that this instruction shifted the burden of proof to the defendant. *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986).

We have examined the district court's instructions in their totality. We are not persuaded by defendant's contentions that these instructions dealing with good faith, willfulness and knowledge were "equivocal, conflicting and inaccurate." We, therefore, reject the assignment of error that we must reverse because of prejudicial error in the jury instructions.

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[6] In *Pabisz*, the prosecutor also argued that defendant's beliefs were "totally unreasonable." *Pabisz*, 936 F.2d at 83. *United States v. Powell*, 936 F.2d 1056 (9th Cir. 1991), also cited by defendant, is distinguishable because the district court there instructed the jury that to succeed in their good faith defense, defendants had to have an "*objectively* reasonable belief." *Id.* at 1061. (*Powell* was subsequently amended and superseded at 955 F.2d 1206 in light of *Cheek*).

[7] The facts of this case " 'support the inference that the defendant was aware of a high probability of the existence of the fact in question [tax liability] and purposely contrived to avoid learning all of the facts.' " *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988)).

## V. *PROSECUTORIAL MISCONDUCT*

### A. *Argument*

Defendant recites a litany of actions by the prosecutor in this case, including principally, a "personal appeal to the jury" and "emphasis on each citizen's duty to pay income taxes." We have reviewed the record carefully and find no reversible error in this respect. In particular, we note no error in arguing that Hauert is "subject to the tax laws . . . just like the rest of us." The issue raised by defendant was not the constitutionality or the validity of the tax laws; rather, he claimed that in "good faith" he did not believe that these laws were applicable to him, and that he did not "willfully violate these laws with respect to the criminal charges made against him."

Hauert also complains that the prosecutor reminded the jury that if they were not convinced that Hauert was acting in good faith, Hauert would be "vindicated" in his contentions and would be getting "a free ride." The fact is that Hauert essentially was claiming that he should not be treated like others because of his own peculiar "good faith" convictions about not being under a duty to file tax returns and pay taxes in the fashion most taxpayers do.

If the prosecutor overstated the theme of the effect of vindication in some respects and urged that Hauert not go "home free," we are not convinced that such error, if any, was prejudicial in the context of the entire trial. We are satisfied, in short, that the prosecutor's conduct did not deprive Hauert of a fair trial, although we do not condone the prosecutor's impugning of defendant's patriotism. Defendant concedes that improper argument "rarely rise[s] to the level of reversible error," and we think it has not risen to that level here. As in *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir. 1992), "[w]e do not believe that counsel's characterizations in this case, even if untoward, were sufficiently egregious to require reversal of the verdict."

### B. *Gabe Thompson Episode*

Defendant admitted during his testimony that his friend and co-employee, Gabe Thompson, tutored him and persuaded him to reach his position on non-taxability of his wages and in not filing income tax returns. He claims it was reversible error for the prosecutor to ask him if he knew whether Thompson was convicted of income tax evasion. Defendant's prompt objection was sustained. We, again, find no reversible error in this respect. Indeed, we express no opinion as to whether such evidence may have been admissible under the circumstances of this case. The believability of Thompson, a close friend, associate and advisor, may well have been an appropriate subject of cross-examination. The district court precluded any answer and perhaps should have advised the jury that whether Thompson was convicted of tax evasion had no direct bearing on the guilt or innocence of defendant Hauert. The mere asking of this question is not, however, a basis for reversing Hauert's conviction.

### C. *Other Prosecutorial Conduct*

Hauert claims that the government attempted to shift the burden of proof in this case. The district court, however, gave the following clear instruction about the burden of proof:

> The indictment in this case is a formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.
>
> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

> The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The district court further charged the jury that the government had to prove that defendant's actions were willful. The prosecutor made a misstatement of the law in argument indicating that Hauert had to convince the jury that he had a good faith belief, but added immediately: "If you think he has a good faith belief, then you are right, he is home free." Defendant's objection to this misstatement was promptly sustained by the trial court. The prosecution told the jury that they might consider whether Hauert's claim of good faith was "reasonable,"[8] and reiterated the erroneous statement that defendant had to convince the jury of his good faith belief. Although this was an incorrect argument, the district court's instructions made it clear that the burden of proof remained with the government throughout. We find no reversible error by reason of the prosecutor's misstatement.

For the reasons indicated, we AFFIRM the jury verdict and the judgment of the district court. The writer must add that Justice Blackmun's dissent in *Cheek* evidences

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[8] *See United States v. Cheek*, 3 F.3d 1057, 1063 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994). Cheek was convicted again by the jury after remand of his case by the Supreme Court. After the Supreme Court's 1991 decision in *Cheek*, one commentator observed:

> [T]he high Court's affirmance of the subjective standard will no doubt embolden at least some factions of the tax protestor movement into continuing their struggle . . . [F]uture defendants [will] continue to attempt to circumvent the tax laws, and then defend their actions on the basis of beliefs subjectively held in good faith.

Anthony Michael Sabino, *Revising the Willfulness Standard for Federal Tax Crimes: The Road from* Bishop *to* Cheek, 11 REV. LITIG. 1, 42 (1991).

considerable prescience: "This Court's opinion, today, I fear, will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity." *Cheek*, 498 U.S. at 210.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: November 14, 1994

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable HARRY H. WELLFORD, Circuit Judge*

---

No. 93-3171

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THOMAS E. HAUERT,

Defendant-Appellant

---

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 93 CR 285, William T. Hart, Judge

---

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

---

* The Honorable Harry H. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

THOMAS EDWARD HAUERT
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)

Case Number: 93 CR 285-1

Raymond Pijon
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) One through Eight after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 26 USC 7201
Nature of Offense: Tax Evasion
Date Offense Concluded: 1/7/91
Count Number(s): 1, 3, 5 & 7

Title & Section: 26 USC 7203
Nature of Offense: Willful Failure to Pay
Date Offense Concluded: 4/15/92
Count Number(s): 2, 4, 6 & 8

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * * * *

☒ It is ordered that the defendant shall pay a special assessment of $300.00, for count(s) One through Eight, which shall be due ☒ immediately ☐ as follows: $50.00 on each of counts 1, 3, 5, & 7 and $25.00 on each of counts 2, 4, 6 & 8.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * * * *

August 26, 1993
Date of Imposition of Sentence

/s/ William T. Hart
Signature of Judicial Officer

WILLIAM T. HART,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

August 26, 1993
Date

Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWELVE (12) MONTHS on each of counts One through Eight.

Said term of imprisonment of twelve months on each count to run Concurrent.

IT IS FURTHER ORDERED that the defendant pay the cost of $1,734.00 per month of incarceration.

Defendant informed of his right to file a timely notice of appeal within ten days.

* * * * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
- ☒ before 2 p.m. on September 28, 1993
- ☒ as notified by the United States marshal, and/or
- ☒ as notified by the probation office.

RETURN

* * * * *

Judgment—Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS with the following conditions:

* * * * *

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

IT IS ORDERED that as further conditions of supervised release the defendant file tax returns for years 1983-1992 to date and pay whatever tax is shown due including interest and penalties. Defendant is ordered to file and pay taxes in a timely fashion from now on. The defendant is ordered not to associate with any tax protestors while on supervised release. The defendant is ordered to pay the cost of supervised release in the amount of $2,171.00 per year.

STANDARD CONDITIONS OF SUPERVISION

* * * * *

Judgment—Page 4 of 5

FINE

The defendant shall pay a fine of $2,000.00.

* * * * *

This fine plus any interest required shall be paid:

☐ in full immediately.

☒ in full not later than expiration of supervised release.

* * * * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Judgment—Page 5 of 5

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * * * *

Guideline Range Determined by the Court:

Total Offense Level: 10

Criminal History Category: I

Imprisonment Range: 6 to 12 months

Supervised Release Range: 2 to 3 years

Fine Range: $2,000.00 to $20,000.00

* * * * *

Restitution: $ none

* * * * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * * * *

Supreme Court, U.S.
F I L E D
APR 7 1995
OFFICE OF THE CLERK

No. 94-1392

# In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS E. HAUERT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the element of willfulness and on petitioner's good-faith defense.

2. Whether the district court abused its discretion when it excluded opinion testimony of lay witnesses about the sincerity of petitioner's claimed belief that he was not liable for taxes.

3. Whether the court of appeals correctly found that remarks by the prosecutor during rebuttal summation did not constitute reversible error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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THOMAS E. HAUERT, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 40 F.3d 197.

### JURISDICTION

The judgment of the court of appeals was entered on November 14, 1994. The petition for a writ of certiorari was filed on February 13, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts of willfully evading income taxes, in violation of 26 U.S.C. 7201, and four counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to 12 months' imprisonment, to be followed by three years' supervised release, and was fined $2,000. Pet. C.A. Br. App. The court of appeals affirmed. Pet. App. 1a-15a.

1. From 1966 through 1992, petitioner was employed by Caterpillar, Inc., during which time he earned wages. Until 1980, petitioner filed income tax returns and listed the wages he earned from Caterpillar as taxable income. Tr. 292, 300. For tax years 1980 and 1981, he filed income tax returns on which he failed to list his wages from Caterpillar as taxable income. Tr. 300. Thereafter, he ceased filing returns. Tr. 242. Also, on his Forms W-4 for tax years 1988 through 1991, petitioner claimed a large number of withholding allowances or claimed to be exempt from federal income tax withholding. Gov't C.A. Br. 7. During those tax years, petitioner was not entitled to the number of allowances he claimed, nor was he exempt from federal withholding requirements. *Ibid.*

The Internal Revenue Service (IRS) audited petitioner for tax years 1980 and 1981. Petitioner and his wife filed a petition in the United States Tax Court to challenge the outcome of the audit. In that petition, petitioner did not contest the IRS's determination that his wages were income. The Tax Court case was eventually settled. Gov't C.A. Br. 9-10.

2. Petitioner was prosecuted for willfully evading taxes and for willfully failing to file tax returns for 1988 through 1991. Petitioner testified at trial that he first developed a belief that wages are not income between the fall of 1980 and March 1981, after a co-worker at Caterpillar, Gabe Thompson, advised him that wages are not income, and that petitioner did not have to file tax returns or pay taxes on his wages. Petitioner testified that he read various tax protestor books, attended tax protestor seminars, and did his own legal research, all of which, he claimed, solidified his belief that wages are not income. Gov't C.A. Br. 11-12.

Petitioner admitted that he knew that Form 1040 advises taxpayers that wages are taxable income, and also that the IRS notified him that he should have included his wages as income on tax returns. He also admitted that a certified public accountant (CPA) had told him that he would be "on thin ice" if he claimed in the Tax Court litigation that wages are not income, because such a position was frivolous, and that the advice had led him not to assert the argument that wages are not income in the case. He further admitted that, by 1986, he had consulted with several lawyers, CPAs, and tax preparers, all of whom informed him that he was required to file tax returns and to pay taxes. He claimed, however, that he chose to rely in good faith on the advice of his co-worker Gabe Thompson, who was neither an attorney nor a CPA. Gov't C.A. Br. 12-13.

Petitioner called as witnesses five acquaintances, who testified that he had a good reputation for truthfulness. Petitioner also sought to ask those witnesses whether they had an opinion as to whether he had a good-faith belief in his positions on the tax laws, but

the district court precluded that testimony under Federal Rules of Evidence 701 and 704. Noting that Rule 704(b) precludes experts from testifying in criminal cases as to the ultimate issue of a defendant's mental state, the court reasoned, "by extension," that "opinion testimony is simply not available on this topic, * * * whether or not [petitioner] is sincere in the beliefs that may have caused him to mistake his obligation under the Internal Revenue Code." Tr. 124-125.

During the government's closing argument, the prosecutor stated that petitioner "is the individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated." Tr. 552. The district court immediately sustained petitioner's objection to that argument. *Ibid.*

At the end of trial, the district court instructed the jury on the element of willfulness as follows (Tr. 564):

> When the words "willful," "willfulness," or "willfully" are used in these instructions, they mean the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. In other words, they mean that [petitioner] knew he was required by law to file an income tax return, or to file a return and pay tax and failed to do so, with the purpose either to disobey or disregard the tax laws.
>
> A failure to act is willfully done if done voluntarily, and intentionally, as distinguished from a failure to act as a result of ignorance or a mistake.

The district court also instructed the jury on petitioner's good-faith defense (Tr. 564-565):

> If [petitioner], in good faith, believed the tax laws did not require that he file individual income tax returns for a particular year, then any failure to file an individual income tax return for that year cannot be found to be wiliful, even if such belief was incorrect. Similarly, if [petitioner], in good faith, believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not.

3. The court of appeals affirmed. Pet. App. 1a-15a. On the issue of the instructions on willfulness and good-faith belief, the court rejected petitioner's argument that the district court was required to instruct the jury specifically that good faith was a matter of petitioner's "subjectiv[e] belie[f]." *Id.* at 10a-11a. The court also concluded that the instructions given were consistent with *Cheek* v. *United States*, 498 U.S. 192 (1991). See Pet. App. 10a.

The court of appeals also upheld the district court's exclusion of the proffered lay opinion testimony about the sincerity of petitioner's claimed beliefs about the application of the tax laws. Pet. App. 5a-8a. The court observed that, to be admissible under Federal

Rule of Evidence 701, lay opinion testimony must be "helpful to a clear understanding of * * * the determination of a fact in issue." See Pet. App. 6a. The court noted that lay opinion testimony on a party's knowledge of the law usually will not satisfy Rule 701, *id.* at 7a, and it reasoned that, because of the nature of this case, petitioner's beliefs about the propriety of not filing returns were "closely related to [his] knowledge about tax laws," *id.* at 8a. It thus concluded that the lay opinion testimony proffered by petitioner would not have been helpful to the jury in obtaining a clear understanding about whether petitioner held a good-faith belief about the application of the tax laws. *Ibid.*

The court of appeals further held that the prosecutor's statement, during rebuttal summation, about petitioner's need to persuade the jury of his good faith, was not reversible error. Although the court believed that the prosecutor's argument appeared to shift the burden incorrectly to petitioner to prove that he had a good-faith belief, the court concluded that the error was harmless because the district court sustained an immediate defense objection, and because the court instructed the jury that the burden of proof remained on the government throughout the proceedings. Pet. App. 14a.

## ARGUMENT

1. Petitioner contends (Pet. 10-19) that the district court's instruction on good faith did not comply with *Cheek* v. *United States*, 498 U.S. 192 (1991), and that the court of appeals' decision upholding that instruction conflicts with a decision of the Second Circuit. Those arguments are without merit.

a. In *Cheek*, the Court concluded that the element of willfulness in criminal tax prosecutions requires the government to prove the "voluntary, intentional violation of a known legal duty." 498 U.S. at 201; see also *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam). Under *Cheek*, it is error for a district court to instruct the jury that a defendant's claimed good-faith belief about the applicability of the tax laws must be objectively reasonable. 498 U.S. at 203. Contrary to petitioner's assertion (Pet. 16), however, *Cheek* did not also hold that a trial court must expressly instruct the jury that objective reasonableness is completely irrelevant to the question of willfulness.

In this case, the district court's "willfulness" instruction satisfied the requirements of *Cheek*. The court instructed that, "[w]hen the words 'willful,' 'willfulness,' or 'willfully' are used in these instructions, they mean the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. In other words, they mean that [petitioner] knew he was required by law to file an income tax return, or to file a return and pay tax and failed to do so, with the purpose either to disobey or disregard the tax laws." Tr. 564. That instruction tracked the definition of "willfulness" set forth in *Cheek*.

In addition, even though no separate instruction on good faith is required (see *Cheek*, 498 U.S. at 201; *Pomponio*, 429 U.S. at 13), the district court instructed the jury as follows:

> If [petitioner], in good faith, believed the tax laws did not require that he file individual income tax returns for a particular year, then any failure

> to file an individual income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if [petitioner], in good faith, believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.

Tr. 564. The good-faith instruction did not suggest that petitioner's claimed belief had to be objectively reasonable to negate willfulness, and therefore did not contravene *Cheek*.

b. Petitioner argues (Pet. 10, 15-19) that the decision below conflicts with *United States* v. *Pabisz*, 936 F.2d 80 (1991), in which, he asserts, the Second Circuit required that the district court expressly instruct the jury that it should consider only the defendant's subjective beliefs, and that those beliefs need not be objectively reasonable. In *Pabisz*, the district court had instructed the jury, before *Cheek*, that "[t]he issue for you is[,] was the defendant reasonable in having a good faith belief that the income tax law did not apply to him." *Id.* at 82. The Second Circuit stated that "[t]he basic problem with the instruction given is that, on the issue of good faith, the jury was not instructed that it must consider whether Pabisz subjectively believed that he did not need to file income tax returns or pay taxes. Put another way, the court did not instruct the jury that defendant's beliefs need not be objectively reasonable if they were actually held in good faith." *Id.* at 83 (citations omitted).

The Second Circuit revisited the issue of proper instructions on good faith in *United States* v. *Droge*,

961 F.2d 1030, cert. denied, 113 S. Ct. 609 (1992). In *Droge*, the district court told the jury that it should acquit the defendant "if you find that he sincerely and in good faith believed that the law was that he did not have to file a return." *Id.* at 1038. The court of appeals observed that the instruction did not "explicitly eschew an 'objective' standard or expressly state that the jury had to employ a 'subjective' standard in measuring the veracity of [the defendant's] asserted beliefs." *Ibid.* The court of appeals nonetheless reasoned that the case was "quite unlike *Cheek* or *Pabisz*" because of the good-faith instruction that was given, and it concluded that the instruction's "emphasis on [the defendant's] personal sincerity and good faith in those beliefs, and whether they were honestly held by [the defendant], adequately communicated the subjective approach that the jury was required to take." *Ibid.*

Like the instruction in *Droge*, the willfulness instruction given by the district court in this case focused on petitioner's state of mind, and it did not suggest that an erroneous belief actually held in good faith had to be objectively reasonable to negate willfulness. There is no reason to believe that the Second Circuit would reach a different result on the facts of this case.

c. Petitioner also contends (Pet. 18-19) that the district court erred in instructing the jury that "a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not." Tr. 564-565. Petitioner argues that the instruction was improper because there was no evidentiary basis for a finding that his refusal to

pay taxes was motivated by mere disagreement with the tax laws.* The district court concluded, however, that the instruction was warranted because "the evidence does support at least an argument on the part of the government that [petitioner's] real motive arises out of a disagreement with the tax laws." Tr. 470.

The district court's conclusion was proper. Petitioner testified that he first arrived at the belief that wages are not income after a discussion with a coworker. Petitioner stated that he continued to hold that belief in good faith, notwithstanding advice from attorneys, CPAs, and IRS agents that wages must be included as income. Based on that testimony, the government could properly argue, and the jury could reasonably conclude, that petitioner's alleged belief that wages are not income amounted to nothing more than a disagreement with the law. As the Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws." 498 U.S. at 203-204.

2. Petitioner contends (Pet. 19-24) that the district court erred in refusing to allow five defense witnesses to give opinion testimony that he sincerely held his claimed belief that he was not liable for taxes. See Pet. 20 (petitioner sought to introduce testimony that, "in the opinion of these witnesses," his beliefs

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* Petitioner cannot contend that the instruction misstated the law. In *Cheek*, 498 U.S. at 205-206, the Court held that mere disagreement with the tax laws does not negate willfulness.

were sincerely maintained). That contention is incorrect.

Under Federal Rule of Evidence 701, if a witness is not testifying as an expert, "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." The admission of lay opinion testimony is committed to the sound discretion of the district court. *United States* v. *Burnette*, 698 F.2d 1038, 1051 (9th Cir.), cert. denied, 461 U.S. 936 (1983); see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974). In this case, the district court properly exercised its discretion under Rule 701, because the excluded testimony would not have been helpful to the jury.

The theory behind Rule 701 "is that wherever inference[s] and conclusions can be drawn by the jury as well as by the witness, the witness['] [opinion testimony] is superfluous." *United States* v. *Jackson*, 688 F.2d 1121, 1124 (7th Cir.) (emphasis omitted), cert. denied, 460 U.S. 1043 (1983). The lay opinion testimony proffered by petitioner would have added little to the jury's understanding of the case. The best evidence from which the jury could determine whether petitioner held his asserted beliefs in good faith was petitioner's own factual testimony about those beliefs and how he arrived at them, and petitioner testified at length about those subjects.

Moreover, as the court of appeals correctly observed (Pet. App. 7a-8a), petitioner's acquaintances were not well positioned to give an informed opinion about the sincerity of petitioner's beliefs, because that opinion would have required them to be familiar

with petitioner's knowledge of the tax laws. There was no showing in this case that they had such familiarity. "When a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701." *United States* v. *Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992).

3. Finally, petitioner contends (Pet. 24-26) that a statement by the prosecutor during closing argument impermissibly shifted the burden to petitioner to prove his good-faith defense, and incorrectly informed the jury that an acquittal would absolve petitioner of liability for his unpaid taxes. Petitioner notes that "[t]he Court of Appeals was satisfied that an objection to this argument was sustained" by the district court, but he asserts that "[t]he cure was inadequate." Pet. 26. That fact-bound contention was correctly rejected by the court of appeals and does not warrant further review.

Any error caused by the prosecutor's remark during closing argument was harmless, because the district court immediately sustained petitioner's objection and admonished the prosecutor to "[s]tay with the issues." Tr. 552. The district court also properly instructed the jury on the burden of proof (Tr. 559), as follows:

> [Petitioner] is presumed to be innocent of the charges. This presumption remains with [petitioner] throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that [petitioner] is guilty.

> The government has the burden of proving the guilt of [petitioner] beyond a reasonable doubt, and this burden remains on the government throughout the case. [Petitioner] is not required to prove his innocence or to produce any evidence.

That instruction clearly placed the burden of proving every element of the case, including willfulness, on the government. Moreover, the instruction informed the jury that petitioner was not required to prove his innocence or to produce any evidence in his defense. As the court of appeals held, the instruction was sufficient to dispel any prejudice that the prosecutor's statement might have caused. See *United States* v. *Stillwell*, 900 F.2d 1104, 1112 (7th Cir.) ("Defendants are entitled to a new trial only if the government's comments * * * prejudiced the defendants' rights to a fair trial."), cert. denied, 498 U.S. 838 (1990).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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